

August 6, 1953

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SEP 03 1998

James Jackson, Esq.
City Solicitor
Dover, New Hampshire

CONCORD, N.H.

Re: State v. Roger Wood

Dear Mr. Jackson:

Now that the Municipal Court of Dover has decided to entertain jurisdiction of the State's complaint against Roger Wood for operating a car while under the influence of liquor, I am writing you in aid of any further proceedings regarding the question of the constitutionality of a trial before a municipal court judge without a jury.

In my opinion, Judge Gregoire's denial of Mr. McCarthy's motion is sound. Clearly, under Article 77 of the Constitution, as amended in 1912, the General Court is

"empowered to give to police courts original jurisdiction to try and determine, subject to right of appeal and trial by jury, all criminal cases wherein the punishment is less than imprisonment in the state prison."

Pursuant to Article 77 of the Constitution, as amended, the General Court in 1915 enacted the jurisdictional provisions now contained in sections 15 through 21 of chapter 377, Revised Laws. Article 77 of the Constitution modifies the right to trial by jury originally conferred by the Constitution to the extent set forth in the terms of the 1912 amendment.

State v. Gerry, 68 N.H. 495, was decided in 1896, prior to the 1912 constitutional amendment. The statute which the court held in that case to be unconstitutional was chapter 117 of the Session Laws of 1895, which was repealed by chapter 21, Laws of 1897. Nor did the court in State v. Gerry hold that in all misdemeanors there must be a right to trial by jury. The court's holding was merely that Laws

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of 1895, chapter 117, section 1 providing that police courts shall have concurrent jurisdiction with the Supreme Court in any criminal case, where the fine does not exceed two hundred dollars, and the term of imprisonment does not exceed one year, imposed a maximum penalty beyond the then jurisdiction of a justice of the peace and was therefore void and in violation of the constitutional guarantee that, except for offenses within the jurisdiction of a justice of the peace, a person shall have an absolute right to trial by jury. The rationale of the court decision is set forth in State v. Jackson, 69 N.H. 511, 512, as follows:

"In State v. Gerry, 68 N.H. 495, it was held that a statute giving police courts concurrent jurisdiction with the supreme court, subject to appeal, of criminal cases in which the fine did not exceed \$200 and the term of imprisonment did not exceed one year (Laws 1895, c. 117), conflicted with article 15 of the bill of rights, and was void. The grounds of the decision were that, by this article, there was secured to the defendant in all criminal cases a trial by jury of substantially the same character and reached by the same procedure as that which was in use in 1784, when the constitution was formed; that there were at that time two classes of offences, each having a course of procedure peculiar to itself; that the jury trial for offences of the higher class was preceded by an indictment found by a grand jury or an information filed by the state's attorney, while that for minor offences could be had only after a previous trial by a justice of the peace, and by claiming an appeal from his decision to a court provided with a jury, entering into a recognizance to enter and prosecute the appeal, and complying therewith; that the latter course of procedure could not be applied to the prosecution of offences of the higher order without impairing the right secured to the accused; and hence that the police court had no jurisdiction in Gerry's case, as the offence with which he was charged was of that order. . . ."

State v. Jackson is affirmative law in support of the proposition that even without Article 77 of the Constitution, the accused is not entitled to trial by jury in cases in which justices had jurisdiction at the time of the adoption of the Constitution.

Related to the question of the right to trial by jury raised by this case is chapter 67, Laws of 1947, amending section 19, chapter 377, Revised Laws. This statute provides as follows:

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"Transfer to Superior Court. If the defendant, upon entry of any action in which he has a constitutional right to trial by jury, shall, within five days from the entry thereof or such additional time as the municipal court for good cause may allow, file a written request for trial by jury, the cause shall be at once transferred to the superior court for said county, to be there heard and tried as if originally entered therein, the cost of entering said cause in the municipal court and transferring the same to be paid in the first instance by the plaintiff, but to be taxed in the bill of costs when the case is finally determined."

By a ruling of the Chief Justice of the Superior Court, Honorable Stephen M. Wheeler in Grafton County Superior Court, in the cases of State v. Robert DeGuise and State v. Hamilton Pollock, it was held that the Superior Court was without jurisdiction to try two cases transferred without ruling by the Municipal Courts of Bethlehem and Littleton on the ground that section 19, chapter 377, Revised Laws, relates to civil and not to criminal transfers.

In view of Article 77 of the Constitution and the subsequent action of the Legislature in conferring original jurisdiction upon municipal courts in criminal cases under chapter 377, Revised Laws, it is clear that no transfer of a criminal case under the original jurisdiction of the municipal court may be transferred to the superior court without a prior adjudication of the municipal court.

In the event that counsel for the respondent in this case decides to appeal to the Supreme Court, this office, under section 5, chapter 24, Revised Laws, will brief and argue the case in support of the State's position. The State's interest in this matter arises from the fact that if municipal courts are not empowered to entertain original jurisdiction of misdemeanors, the criminal process in this state would be jeopardized.

I enclose two copies of this letter so that you may submit one copy to Honorable Ovila J. Gregoire for his information.

Sincerely,

John N. Nassikas
Deputy Attorney General

JNN/d
Encl (1)